U.S. Department of Labor

Board of Contract Appeals
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Date: April 16, 1999

Case No.: 1997-BCA-1

Appeal of

GREGORY B. JACOBS

Contract Nos: B934-1598- and B936-1700

Gregory B. Jacobs, *pro se*

Frank P. Buckley
For the Contracting Officer

BEFORE: MILLER, LEVIN AND VITTONE
Miller, Member, Board of Contract Appeals

DECISION AND ORDER

Statement of the Case

By letter dated November 25, 1996, Gregory B. Jacobs ("Jacobs" or "Appellant" or "the Contractor") appealed the November 7, 1996, final decision of a U.S. Department of Labor ("DOL") Contracting Officer denying his claim for payment for services, in the amount of $3,646.50 under Purchase Order Nos. B934-1598 and B936-1700. The Contracting Officer's denial had two express bases: first, the ceiling amount of Purchase Order No. 13934-1598 was $25,000 and was not amended; second, the second Purchase Order No. B936-1700 was "prepared," but the trial attorneys did not direct the Contractor to perform any work under it. The Contractor appealed, contending, first, that he had been authorized and directed by the government's trial attorney to perform the work in issue. He contended, in the alternative, that, even if the trial attorney did not specifically authorize him to proceed, the purchase order, which formed the written contract between the two parties, was silent and did not require such authorization or prohibit such work without such authorization. The Contractor contends that it is irrelevant that he did not accept the purchase order in writing before its cancellation, first, because 48 CFR Ch. 1 §13.504(b)(2) provides for termination under Part 49 under circumstances when the contractor does not accept cancellation or claims that costs were incurred as a result of beginning performance under the purchase order, and, second, since he had relied on the trial attorney's instructions to begin preparation for trial and the purchase order language authorizing him to proceed. The Contractor concedes that the funds in Purchase Order No. B934-

1598 were exhausted, and that no further payments could be made or were owed under that purchase order. The parties agreed to a resolution of this case on the written record. For the reasons that follow, the Board has denied the claim.

Findings Based on Stipulated Facts

The parties have stipulated to the following facts, and the Board finds:

1. On January 7, 1994, the U.S. Department of Labor, Pension and Welfare Benefits Administration (PWBA), issued Purchase Order No. B934-1598 in the amount of $25,000 to secure the services of Gregory B. Jacobs of Risk Analysis and Insurance Services, Inc. as an expert witness in the case of Reich v. Kirel. (Appeal File (AF), Tab 2)

2. Jacobs performed services under that purchase order until early in 1995 when the amount of funds under the purchase order was exhausted.

3. On February 5, 1996, Jacobs sent a letter to Robin Springberg Parry, attorney for the Department of Labor, acknowledging receipt of her letter of January 24th. (AF, Tab 3) The letter stated that "a new purchase order needs to be issued to cover expenses and I am going to need some time to re-review the deposition testimony and files. The time spent on this should be minimal."

4. During the early months of 1996, attorneys for PWBA were involved in settlement negotiations concerning the *Reich v. Kirel* case.

5. On February 28, 1996, PWBA issued Purchase Order No. B936-1700 in the amount of $10,000 to secure the services of Jacobs as an expert witness in the *Reich v. Kirel* case. (AF, Tab 5)

6. On March 27, 1996, Jacobs called Parry by telephone and asked the status of the case. (AF, Tabs 6 and 11) Parry told him that it looked like the case was about to settle, although nothing would be official until the documents were filed in court and the court had approved them, and that accordingly his services would probably not be needed by PWBA. (AF, Tab 6) On March 28, 1996, Parry sent Jacobs a letter confirming that the case had been settled. (AF, Tab 6)

7. On April 4, 1996, Purchase Order No. B936-1700 was canceled. (AF, Tab 8)

8. On April 15, 1996, Jacobs sent Parry an invoice in the amount of $3,646.50, claiming 33.15 hours of work on the case since the end of January 1996. (AF, Tab 9)[1] Of the time listed, 27.20 hours were expended after funds from the first purchase order were exhausted in early 1995 and prior to the approval of the new purchase order No. B936-1700, which was issued on February 28, 1996.

[1] The total of hours actually listed on the invoice is 32.90 hours of work. The quarter hour discrepancy is not explained.

9. On May 22, 1996, Parry sent a letter to Jacobs informing him that his invoice would not be approved for payment. (AF, Tab 10)

10. On May 28, 1996, Jacobs sent a letter to Parry which expressed his disagreement with the decision not to approve his invoice for payment. (AF, Tab 11)

11. On November 7, 1996, the Contracting Officer, Daniel P. Murphy, sent a letter to Jacobs' attorney denying the claim for payment of $3,646.50 under Purchase Order No. B934-1598 on the ground that the full amount of the purchase order of $25,000 had been paid. He denied payment of the claim under Purchase Order No. 936-1700 on the ground that Jacobs was not instructed by the trial attorneys to perform work under the purchase order. The letter provided notice to Jacobs of his appeal rights with respect to the denial of his claim. (AF, Tab 15)

12. On November 25, 1996, Jacobs appealed the Contracting Officer's denial of his claim. (AF, Tab 16)

Additional Findings of Fact

13. Purchase Order No. B934-1598, dated January 7, 1994, provided:

> Contractor to be hired for the Reich v. Kirel, et al case (PWBA Case No. 72-11570)
>
> The contractor will provide testimony on the reasonableness of the fees the Local 615 Welfare Fund paid to the Realistic Adjustment Company for adjudicating workers compensation claims. The contractor will opine on the reasonableness of the fees paid to Norman Meyer who, at different times, served as the Fund's plan supervisor, director of claims, and a consultant. Mr. Meyer's wife, Kathy Meyer, owns the Realistic Adjustment Company, and the contractor will opine on certain matters with respect to the self-dealing allegations against Mr. Meyer. The contractor will determine the reasonableness of the compensation paid to Biltmore Insurance Group, Ltd, and its principal Andy Tipton for underwriting the workers compensation benefits offered through the Fund.
>
> The contractor will be compensated for services at an hourly rate of $110.00 per hour for analysis and $165.00 per hour for trial and deposition time, not to exceed $25000.00. The contractor will be reimbursed, within the purchase order total for reasonable and necessary out of pocket expenses including travel which will be reimbursed at govt. rates.
>
> The purchase order provides that the contractor shall, within 15 days after the close of any month when one or more hours is worked, or reasonable expenses are incurred submit an itemized invoice & shall annotate each invoice with the purchase order number.

(AF, Tab 2.)

14. The "Expert Witness Request" requisition form, an internal agency document dated February 14, 1996, stated, to substantially the same effect:

> It is requested that Risk Analysis (Gregory Jacobs), be hired to provide expert witness services in the LU 615 Welfare Fund Case Reich v. Kirel, et al. (PWBA Case No. 72-11570).
>
> The expert will be compensated for services as follows:
>
> | | |
> |---|---|
> | Analysis & Preparation | $110 Per Hour |
> | Trial & Deposition | $165 Per Hour |
>
> not-to-exceed $10,000. The expert will be reimbursed within the purchase order total for reasonable and necessary out-of-pocket expenses including travel which will be reimbursed at government rates. The expert will prepare for and testify at trial and or deposition.
>
> The purchase order provides that the expert shall, within 15 days after the close of any month when one or more hours is worked, or reimbursable expenses are incurred, submit an itemized invoice and shall annotate each invoice with the purchase order number. The expert must provide, with the itemized invoice, receipts for all out-of-pocket and travel expenses.

(AF, Tab 4.) The terms of the requisition form are consistent with the January 7, 1994, purchase order.

15. Purchase Order No. B936-1700, dated February 28, 1996, identified the case and provided:

> The expert will prepare for and testify at trial and or deposition.
>
> The expert will be compensated for services as follows:
>
> | | |
> |---|---|
> | Analysis & Prep. | $110 per hr |
> | Trial & Deposition | $165 per hr |
>
> Not to exceed $10,000. The expert will be reimbursed, within the purchase order total for reasonable and necessary [out] of pocket expenses including travel which will be reimbursed at govt. rates.
>
> The purchase order provides that the expert shall, within 15 days after the close of any

> month when one or more hours is worked, submit an itemized invoice & shall annotate each invoice with the purchase order number. The expert must provide, with the itemized invoice, receipts for all out of pocket expenses.

(AF, Tab 5.)

16. The time for delivery specified on the new purchase order, like the earlier one, was "AS REQ." No method for prescribing when or what particular work should be done was specified in either purchase order. (AF, Tab 2, 5.)

17. Parry's January 24, 1996, letter advised Jacobs that the attorney, Tess Ferrera, who had previously worked on the case, was leaving the Department, and stated in pertinent part:

> . . . [P]lease be informed that a trial date has been set for April 16-29, 1996. At this time it is impossible for us to tell you precisely when you will be called as a witness, so for now please reserve those dates on your calendar.
>
> We are in the process of requesting additional funds under the existing purchase order to ensure that money will be available for the time you spend preparing for trial and for the actual trial appearance. We will be in contact with you well before the trail to discuss what you need to do to prepare for trial.
>
> In the meantime, Tess mentioned a couple of things that we need from you regarding your expert witness report. When last you and she spoke, you mentioned that subsequent to submitting your expert witness report you had served as an expert witness in another case. We have not received the information regarding that appointment. As Tess probably told you, the Federal Rules of Civil Procedure require that we inform the other side of any cases in which you have testified as an expert at trial or by deposition within the preceding four years. At your earliest convenience, kindly send us the name of the case and the issue upon which you rendered an opinion and whether you were deposed or testified at trial. If any transcripts exist with respect to any testimony you may have provided, we will also need to know how to obtain copies.
>
> I am also reviewing your expert witness report to ensure that it is complete. Tess mentioned that you reference certain documents in your report, but may have inadvertently failed to attach the documents to the original report. As soon as I have completed my review, I will let you know which attachments, if any, are required.

(Contracting Officer's submission under letter dated October 16, 1997; Parry Declaration, Exhibit 1.) On the same date, Parry sent a letter to David Curry, another expert witness retained by the Department, which advised in similar terms that a purchase order was being requested, that trial dates April16-29, 1996, should be reserved, and that he would be contacted well before trial to discuss

needed trial preparation. (Parry Declaration, Exhibit 2.)

18. In a February 5, 1996, letter to Parry, Jacobs stated:

> This will acknowledge receipt of your letter dated January 24, 1996, regarding the upcoming trial involving the Local 615 case. Trial has now been set for the period of April 16 through April 29, 1996.
>
> In paragraph 3 of your letter, there is mention that I served as an expert witness in another case involving a workers' compensation issue. That case involved a Canadian corporation doing business in Arizona and dealt with matters of calculation of premium and whether or not a dividend and/or credit was due to the policy holder. The case was settled without the necessity of formal discovery (interrogatories and depositions) or trial. The report that I prepared was utilized and assisted in the successful conclusion of the case for my client. If you believe that you need a copy of it, please let me know and I will forward it to you.
>
> Once you have had an opportunity to review the expert witness report that I prepared, please let me know if you find that you do not have all of the supporting documentation.
>
> As you know, a new purchase order needs to be issued to cover expenses and I am going to need some time to re-review the deposition testimony and files. The time spent on this should be minimal. . . .

(AF Tab 3.) This letter made no reference to the 13.20 hours of work, described as reviews of the case, of specified files, and an expert's report, allegedly performed beginning in January 1996 through February 4, 1996, for which Jacobs subsequently claimed compensation in his April 15, 1996, invoice. Reflected in the letter, but not invoiced, was the *de minimis* response to Parry's request for information concerning Jacobs' prior experience as an expert and the possible need for additional documentation related to his previously prepared expert witness report. Apparently that response was adequate, because there is no evidence of a response to this letter. (AF, Tab 3, 9) Jacobs did not invoice time on February 5 or refer to this letter as billed time in his invoice. (AF, Tab 9)

19. By letter to Jacobs dated March 28, 1996, Parry confirmed that the case had settled, and that further work would not be required, and stated, "[t]hank you for the work that you have done on this case. The Department appreciates your efforts on our behalf." (AF, Tab 6.)

20. Jacobs' letter of April 15, 1996, to Parry stated as follows:

> This will confirm and acknowledge receipt of your correspondence dated March 28, 1996 concerning the settlement of the case Reich v. Carlton Kriel [sic], et al. After receiving your correspondence January 24, 1996 indicating that the case was

> scheduled for trial beginning April 16, 1996, it was necessary that I review the deposition transcripts, claim files and other pertinent documents in order to be prepared to testify. In that regard, enclosed please find the final invoice for the time spent.

(AF, Tab 9.)

21. Jacobs' final invoice, which was enclosed in the April 15, 1996, letter, claimed time as follows:

Date	Time Spent	Description
1-96	0.25	Call to Robin Parry - U.S. DOL. Discussed case.
1-30-96	1.25	Review general file and expert report.
1-30-96	2.50	Review Realistic file.
1-31-96	3.00	Review IAEA files.
2-1-96	0.20	Letter to Robin Parry
2-3-96	3.00	Review of case.
2-4-96	3.00	Review of case.
2-7-96	1.50	Review of deposition file.
2-8-96	2.00	Review of deposition file.
2-10-96	4.00	Review of deposition file.
2-20-96	2.50	Prepare for trial - review of files.
2-27-96	4.00	Review of Realistic claims files and worksheets
3-12-96	2.00	Review of deposition of Emmett Vaughn.
3-26-96	2.50	Review expert witness report - Greg Jacobs & Dave Curry
3-27-96	0.20	Call to Robin Parry re: status of case.
4-11-96	1.00	Prepare formal report and billing.

(AF, Tab 9.) Only 4.7 hours are invoiced between February 28, when the purchase order was issued, and April 4, 1996, when it was canceled after Jacobs had been given notice of settlement on March 27.

22. In a May 22, 1996, letter responding to Jacobs' April 15, 1996, letter and invoice,

Parry stated:

> I have received your letter and "final invoice" for the Kirel case. In my letter to you of January 24, 1996, I advised you that we were in the process of requesting additional funds under the existing purchase order to pay you for your trial preparation and actual trial time. At that time I asked you to reserve the trial dates on your calendar, and said that we would be in contact with you before the trial to discuss what you would need to do to prepare for the trial. However, at no time did we request that you begin preparing for trial or advise you as to the specific work we needed performed. Since settlement negotiations were progressing, there was no reason for you to begin preparing until we were certain that this matter was going to trial, and we therefore did not direct you to begin working until we knew that such work would be necessary. Accordingly, any work that you undertook was not pursuant to specific direction from this office. In fact, much of the work that you list on the invoice, such as review of the IAEA files and review of Emmet Vaughan's deposition, is work that was not required for trial and which we would not have asked you to perform.
>
> The new purchase order was issued on 2/28/96, and that date is clearly visible on the copy of the purchase order which you attached to your invoice. However, 29.45 [sic] hours worked on your invoice (out of a total of 33.15 [sic]) are dated prior to 2/28/96. Before that date, no funds had been approved by the Department. The division of the Pension and Welfare Benefits Administration that issues purchase orders had told us that the Department is not obligated to pay for any services provided prior to the approval and receipt of the purchase order, and prior to the expert having received specific direction from an attorney as to what work needs to be performed. Consequently, your invoice has not been and will not be approved for payment.

(AF Tab 10.) In fact, the invoiced hours prior to 2/28/96 total 27.20, and the total hours invoiced amount to 32.90. The discrepancy between the hours actually invoiced and the hours stated in Parry's letter is unexplained. Likewise, the erroneous total of 33.15 hours stated in Jacobs' invoice is unexplained. On August 2, 1996, Parry sent a similar letter to Curry denying payment of Curry's invoice for work performed on the *Reich v. Kirel* case. (Parry Declaration, Exhibit 4.)

23. By letter dated May 28, 1996, Jacobs responded to the May 22, 1996, letter as follows:

> This will acknowledge receipt of your correspondence dated May 22, 1996 relative to my invoice in the amount of $3,646.50 in preparation for trial that was tentatively scheduled to begin April 16, 1996 and last until April 29, 1996. You and I spoke in late January and you indicated to me at that time that the case against Norman and Kathy Meyers was not going to settle, that there was no anticipation that it would

settle and that it would be necessary to try this case. In that regard you requested that I set aside time to appear at trial for the period 4/16/96 through 4/29/96. I indicated to you at that time that it would be necessary for me to review portions of the documents previously reviewed in order for me to appear in an appropriate manner as an expert witness. You indicated that that would not be a problem and that I should proceed. I further indicated to you that a new purchase order would have to be issued and you also indicated that that would be taken care of. I specifically made this request in that I had not been paid approximately $3,000 for time and expenses incurred under the old purchase order and that I had at one point indicated that the Department of Labor would have to get a replacement expert witness for my portion if they were unwilling to pay me. I was informed that that would not be the case and that any sums incurred as a result of my preparation would be reimbursed to me.

In addition, I indicated to you that it was critical for me to know the specific dates and whether or not there would be any chance of settlement in that my business had grown substantially and I was involved in a major project that I had been working on the past five years involving Arizona Public Schools.

I wrote to you on February 5 and indicated to you that a new purchase order needed to be reissued covering expenses and I was going to need time to review the deposition testimony and certain files. At no time did I receive any information and or direction from you not to proceed with preparation for trial.

I did not hear back from you and, in fact, did not communicate with you until I called you on March 27 to determine the status of the case. It was at that time that you indicated that there was a possibility that the case might settle and that you would let me know. I was notified by you in writing on March 28, 1996 that the case would be settled. I indicated that I would prepare a final report, send final billing and close my file. I then received your letter of May 22 which I take significant exception to.

As previously indicated, I was told I would be reimbursed for all of the expenses incurred. I performed a number of services without charge to the United States Government and, in fact, discovered a $13,000 overpayment which I returned to the DOC. I am not going to let this matter simply end with your telling me Pension Welfare Benefits Administration does not believe that it owes me the money that I have billed. Please advise as to when I may expect payment: if you choose not to pay, I will have no choice but to take legal action to collect those sums owed to me and would appreciate it if you would let me know who your statutory agent is.

(AF Tab 11.) Jacobs had received no response to this letter by July 10, 1996, when his counsel sent Parry an ultimatum on behalf of Jacobs. (AF Tab 12.)

24. Sherwin Kaplan, the Deputy Associate Solicitor for the Plan Benefits Security Division

reiterated the Department's position in a letter to Jacobs' counsel dated August 1, 1996:

> As you have previously been informed, Mr. Jacobs had, in fact, been retained by the Department as an expert witness in the above-captioned case. A copy of that contract was provided to Mr. Jacobs and clearly indicated the maximum amount that could be paid to Mr. Jacobs. That amount was fully paid.
>
> While there were subsequent discussions between Mr. Jacobs and Department of Labor personnel about an extension of that contract, Mr. Jacobs was clearly informed that no work could be commenced until a new contract was signed and, even if a new agreement were entered into, any additional work could only be done pursuant to the express direction of an attorney in this office.
>
> Despite these express prohibitions, Mr. Jacobs, apparently, undertook, on his own initiative, certain work for which he now seeks reimbursement. Since any work, subsequent to the expenditure of all funds under his original contract, was neither authorized by contract nor pursuant to any direction from or agreement with any Department of Labor personnel, no payment can be made from Department funds.

(AF Tab 13.)

25. Parry testified by sworn declaration in relevant part:

> 3. In late January, 1996, I spoke to Mr. Jacobs and informed him that the case was set for trial in April and asked him to reserve the trial dates. At that time, I advised him that PBSD [Plan Benefits and Security Division] was in the process of requesting additional funds under the purchase order. Mr. Jacobs said that he would probably need to review some documents, which wouldn't take much time, in order to get ready for trial. I responded that made sense and that once the purchase order was approved, I would specifically discuss with Mr. Jacobs what work would need to be done in preparation for the trial. I did not tell Mr. Jacobs that he could or should begin any work, including review of documents, before the purchase order was approved or without discussing with me what work he would be doing. Also, I did not inform Mr. Jacobs that this case would not be settled, since there were ongoing settlement discussions between the parties.
> 4. On January 24, 1996, I sent a letter to Mr. Jacobs which repeated that the trial was scheduled for April 16-19, 1996 and that he should reserve those dates on his calendar. The letter also reiterated th[at] PBSD was in the process of requesting additional funds and that I would contact him before trial to discuss what work he should do. A copy of this letter is attached as Exhibit No. 1.
> 5. In late January, 1996, I spoke to Mr. David Curry and informed him that the *Reich v. Kirel* case was set for trial in April and asked him to reserve the trial dates. He agreed. I also told him that I would be in contact with him before trial to discuss

what he should do to prepare for the trial. I did not tell Mr. Curry to begin work preparing for the trial before discussing with me what work he should be doing.

6. On January 24, 1996, I sent a letter to Mr. Curry confirming my discussion with him concerning the trial dates and the fact that he should reserve those dates on his calendar. The letter also states that I will be in contact with him before trial to discuss the work he should do. A copy of this letter is attached as Exhibit No. 2.

7. In May, 1996, Ms. Thelma Hill, Program Analyst, Pension and Welfare Benefits Administration, U.S. Department of Labor, informed me that David Curry, on receiving his purchase order in March, 1996, told her that he had informed Tess Ferrera that he would never work for DOL again because he felt that DOL had cheated him out of thousands of dollars. Ms. Hill also told me that Mr. Curry indicated that Mr. Jacobs felt the same way concerning his dealings with DOL. However, Mr. Curry never made such statements to me.

8. By letter dated May 22, 1996, I informed Mr. Jacobs that his invoice in the amount of $3,646.50 would not be approved for payment. A copy of this letter is attached as Exhibit No. 3.

9. By letter dated August 2, 1996, I informed Mr. Curry that his invoice in the amount of $2,640 would not be approved for payment. A copy of this letter is attached as Exhibit No. 4.

26. Tess Ferrera, a former attorney with the Plan Benefits Security Division of the Solicitor's Office, testified by sworn declaration in relevant part that:

4. In November, 1993, Gregory B. Jacobs was retained as an expert witness for the *Reich v. Kirel* case under a purchase order with a limit of $25,000. The purpose of the purchase order was to obtain expert analysis and testimony on the market rates paid to third party administrators for adjudicating workers' compensation claims in Phoenix, Arizona. This information was necessary in order to determine the reasonableness of fees paid in the *Reich v. Kirel* case.

5. I was Mr. Jacobs' primary contact under this purchase order. My practice was to discuss with Mr. Jacobs the work which needed to be done in the case before giving him authorization to begin. I gave him specific instructions concerning the work which he should perform.

6. When Mr. Jacobs had completed a draft expert witness report, I flew to Phoenix, Arizona to assist him and another expert retained under a separate purchase order with their final reports. Both reports needed significant revisions. I knew that the funds available under Mr. Jacobs purchase order were close to being exhausted. I spoke to Mr. Jacobs on more than one occasion about whether he thought that he could complete the work under the existing purchase order or whether he thought I should seek additional funds. Mr. Jacobs assured me that he could complete the expert witness report under the existing purchase order.

7. I was quite surprised when he billed the government claiming $2,090 for the time I spent with him in Phoenix, Arizona revising and correcting his final expert

witness report. Since this amount exceeded the purchase order limit of $25,000, it was not approved.

27. Jacobs testified by sworn declaration that:

1. I am self-employed as president of Risk Analysis and Insurance Services, Inc., located at 3610 N. 44th St., 250, Phoenix, AZ, 85018.
2. In November of 1993 I was retained as an expert witness for the *Reich v. Kirel* case under a purchase order with a limit of $25,000. The purpose of the purchase order was to provide expert analysis and testimony on the market rates paid to third party administrators for adjudicating workers compensation claims in Phoenix, AZ. The United States Department of Labor requested this information in pursuit of its case against certain defendants in the case of *Reich v. Kirel*. My primary contact was with Attorney, Tess Ferrera, who was employed as an attorney in the Planned Benefits Security Division, Office of the Solicitor, United States Department of Labor, Washington, D.C.
3. In January of 1996, Attorney Robin Springberg Parry contacted me and advised me that the case of *Reich v. Kirel, et al*, (PWBA case no. 72-11570) was not going to settle and I was going to be needed to do additional work in preparation for trial and that I was to be available for trial the week of April 16-29, 1996. Attorney Parry also indicated that there was no possibility for settlement and that I needed to proceed in preparing for trial. She indicated that an additional purchase order would be issued in the amount of $10,000 and that I should begin with preparation. I advised Attorney Parry that my schedule was very full and that I would need to begin preparing for trial immediately. Attorney Parry agreed and advised me to begin preparation for trial and I was told a purchase order would be sent to me within a short period of time.
4. After my conversation with Attorney Parry I made a telephone call to David Curry, who was also retained by the United States Department of Labor as an expert witness on this case. He had just received a telephone call and had a similar conversation with Attorney Parry and also was informed that he needed to begin his preparation for trial for the same dates as I was advised of. Previous Statement of Dr. David Curry has been provided.
5. On February 5, 199[6], I wrote to Attorney Robin Springberg Parry, requesting a new purchase order be issued covering any expenses for time incurred and I was told that the purchase order was forthcoming and that I still needed to continue to prepare. On February 28, 1996, a purchase order in the amount of $10,000 was issued and sent to Mr. Jacobs. The purchase order states "Will prepare for and testify at trial and/or deposition". There was no communication written or oral between Robin Springberg Parry and myself until March 27, 1996, at which time I called Attorney Parry to inquire about the status of the case. At that time, Attorney Parry indicated that there was a possibility that the case might settle and that she would let me know. On March 28, 1996, I was informed in writing by Attorney Parry

that the case had been settled.

6. I reported that I was going to prepare my final report and send in for final billing and close my file.

7. At all time[s] Gregory B. Jacobs, operated with the specific direction from the Attorney's Tess Ferrera, and Robin Springberg Parry for preparation for expert testimony involving the case of *Reich v. Kirel.*

Curry's testimony by sworn declaration is substantially similar in relevant part to Jacobs' testimony.

28. In his notice of appeal dated November 25, 1996, Jacobs concedes that the funds available under Purchase Order Number B934-1598 have been exhausted, and that no payments could be made pursuant to that Purchase Order. Jacobs has never asserted that the current claim should be paid under Purchase Order Number B934-1598. (AF, Tabs 14 and 16.)

29. Ferrera's statement that her practice in dealings with Jacobs under the first purchase order was to discuss what work needed to be done before authorizing him to begin was not disputed by Jacobs. In fact, in his sworn declaration he stated that at all times he operated with the specific direction from Ferrera and Parry in preparing for his expert testimony in the case. The Board finds, therefore, that Jacob's invoiced work performed exclusively at his own initiative beginning in January 1996 was not performed in conformity with the prior established practice and understanding of the parties.

Discussion

Between the time that the $25,000 provided under the original purchase order were exhausted in 1995 and the time that the new purchase order was issued on February 28, 1996, there was no contract in existence pursuant to which Jacobs could have performed work and been compensated. The earlier purchase order had expired in accordance with its terms, because the funds specified were exhausted. The new purchase order, regardless of assurances, had not been issued. When the new purchase order was issued, it was not expressly retroactive in effect, and there is no proof that it qualified as an amendment or modification of the earlier purchase order. Thus, the only theory by which the Appellant Jacobs could recover during the hiatus between purchase orders was that there was a contract implied-in-fact. The elements of such a contract are clearly not present in this case.[2] Neither Parry nor any other Federal employee had the authority to direct Jacobs to perform work in

[2]An implied-in-fact contract requires findings of: 1) mutuality of intent to contract; 2) consideration; and, 3) lack of ambiguity in offer and acceptance. *Russell Corp. v. United States*, 210 Ct. Cl. 596, 537 F.2d 474, 482 (1976), *cert. denied*, 429 U.S. 1073 (1977); *Fincke v. United States*, 230 Ct. Cl. 233, 675 F.2d 289, 295 (1982). When the United States is a party, a fourth requirement is added: the Government representative "whose conduct is relied upon must have actual authority to bind the government in contract." *Juda v. united States*, 6 Cl. Ct. 441, 452 (1984) (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). *See City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

the absence of a contract. Jacobs was bound under settled law to ascertain the authority of any government personnel giving him direction.

The issuance of a purchase order is an offer by the government which may be accepted by the contractor by signing the purchase order and promising to perform in accordance with the terms of the purchase order, in which case it is a bilateral contract. Or the contractor may accept the offer by timely performance, delivering the commodities or services as specified in the purchase order, in which case it is a unilateral contract. Federal Acquisition Regulations ("FAR") 13.101, 13.108(a), 13.108(b), 13.503(a); *C.G. Norton Co.*, ENGBCA No. 5182, 88-1 BCA ¶ 20,462. If performance is not timely in accord with the specifications of the purchase order, the purchase order and contract expire. Partial performance may require a termination for default or termination for convenience. Neither of these alternatives applies in the circumstances of this case, because the Board finds that Jacobs had not been directed to perform as required and was, therefore, without authority to do so. In this regard, this tribunal finds the correspondence between the parties which occurred before relations became contentious to be more credible than the later correspondence and potentially self-serving statements made in contemplation of litigation. Consequently the claim for work performed prior to issuance of the new purchase order fails, and is rejected.

In the instant case, the Department extended an offer to Jacobs to pay him for his services as an expert witness by issuing the first Purchase Order No. B9341598 on January 7, 1994. There is no dispute that Jacobs accepted the offer by performing services as directed, and was paid for those services, under that purchase order. There is also no dispute that a contractual relationship existed between Jacobs and PWBA pursuant to the January 7, 1994, purchase order.

The Contracting Officer contends that, once funds were exhausted under that purchase order, no contractual relationship existed between the parties until the second Purchase Order No. B936-1700 was issued on February 28, 1996, and accepted by delivery of services as directed. Therefore, the Contracting Officer denies any obligation to compensate Jacobs for 27.20 hours of work performed prior to February 28, 1996, and after the exhaustion of funds under the prior purchase order.

In the absence of an amendment or modification, the January 7, 1994, purchase order expired when the funds obligated under that purchase order were exhausted, although at the time the funds were exhausted, Jacobs had not completed all of the work as an expert witness which was contemplated by the parties and for which he had been engaged by PBSD under the purchase order. Although he had prepared and substantially completed his expert witness report, he had not testified at trial or deposition. The case was scheduled for trial, and it was anticipated that Jacobs would be required to testify at trial. In January 1996, the parties sought to extend funding to permit completion of the originally contemplated services under the contract. On February 28, 1996, the new purchase order was issued. The February 28, 1996, purchase order, was for the same services, and contained the same provisions, as the January 7, 1994, purchase order. However, the exhaustion of funds under the earlier purchase order terminated the purchase order contract. *See Tymshare*, PSBCA No. 206, 76-2 BCA 12218. By continuing to perform the prescribed services after expiration of the contract

and before receiving either an extension or notice that a new purchase order had been issued, Jacobs assumed the risk that the contract would not be extended or that he would not be paid for the work performed. *See Eaton Corp.*, ASBCA No. 38386, 91-1 BCA ¶23,398.

The Board also finds that Jacobs is not credible in certain basic respects, and that his claim must fail on that basis also. In substance, Jacobs contends that he had been advised in early January that he should reserve specified dates in April to be available to testify as an expert at trial, because the case was not expected to settle. He contends that he told Parry that he needed to prepare for that testimony by reviewing files and records, and he had a tight personal schedule. His expert witness report apparently was substantially complete and not significantly involved in the preparatory work he anticipated. Jacobs contends that he was told by Parry that another purchase order would be obtained and that he should proceed with his preparation. He did so to the extent of almost thirty-three hours from January through March, according to his billing invoice. 25.70 of those hours were accrued prior to issuance of the second purchase order on February 28, 1996.

Parry admits having advised Jacobs of the need to reserve the trial dates, and the intention to obtain the new purchase order, but denies authorizing Jacobs to do additional work. There is no proof by either party, except Jacobs' uncorroborated and self-serving statement, that Parry gave Jacobs any directions to perform specific work, other than the *de minimis* response in Jacobs' letter of February 5, 1996, identifying his other expert testimony and briefly referring to additional documentary support for his opinion as an expert witness. Although Jacobs contends in his May 28, 1996, letter that "[a]t no time did I receive any information and or direction from you not to proceed with preparation for trial," in fact, such direction was implicit, if not explicit, in Parry's direction, "We will be in contact with you well before the trial to discuss what you need to do to prepare for trial." This conclusion is reinforced by the evidence that Jacobs' work had been coordinated or directed by Ferrara under the first purchase order.

When Parry called Jacobs in January 1996 and asked him to reserve certain dates for the trial of the *Kirel* case, she also told Jacobs that she was seeking a new purchase order for his services as an expert witness. Jacobs testified that Parry gave him authorization to proceed with preparation for trial after he told her that he needed to begin preparing immediately because of the demands of his growing business, and that Parry told him that there was no possibility of settlement. However, Parry did not state in her confirmatory letter of January 24, 1996, that Jacobs could or should begin work, or that the case would not settle. In fact, to the contrary, she stated that PWBA was "in the process of requesting additional funds under the existing purchase order to insure that money [would] be available for the time [Jacobs would] spend preparing for trial and for the actual trial appearance." She continued, explicitly, "We will be in contract with you well before the trial to discuss what you need to do to prepare for trial." Thus, she made clear that money was not yet available for present work, and that she intended to advise Jacobs as to what work needed to be done. If there was any ambiguity, it was Jacob's duty to inquire. Presumably he had the opportunity to do so in his February 5, 1996, letter which did not mention the work he was doing in the face of Parry's caveat. Thus, it would appear that any work that was done was done without the knowledge of any authorized agent of the Government.

In the present case, Jacobs performed work prior to the issuance of the second purchase order and before receiving specific instructions from Parry. Although Jacobs informed Parry that he would need to review the case files and depositions, there is no evidence that Parry knew or should have known that Jacobs had commenced his preparation for trial. Jacobs, therefore, assumed the risk that the purchase order might not be approved, that his services might not be needed, and that he might not be compensated for his services performed prior to instructions or authorized purchase order funding. This Board has previously held that "[i]f a contractor such as Appellant proceeds on [his] own initiative to perform questionable work without direction from the government, [he] is not entitled to an equitable adjustment to compensate [him] for such work, even if there were a possible conflict in the specifications defining the contract work." *Jewell Lewis Shane*, LBCA No. 87-BCA-11, ___ BCA ¶ ____, *citing J.J. Bonavire Co.*, ASBCA No. 29846, 89-3 BCA ¶ 22,128.

These circumstances are analogous to the situation presented in *Eaton Corp.*, ASBCA No. 38386, 91-1 BCA ¶ 23,398. In *Eaton*, the contractor was given notice that the government was going to exercise its option to extend the contract. The modification extending the contract was not issued prior to the expiration of the contract, but the contractor continued to perform in anticipation of the contract extension. The government had no knowledge of the contractor's continued performance. The contract was not extended for budgetary reasons, and the contractor filed a claim for the work performed after the expiration of the contract. The Armed Services Board of Contract Appeals found that the contractor, by continuing performance after the expiration of the contract and before receiving the contract extension, assumed the risk that the contract would not be extended, and therefore, was not entitled to further compensation.

Parry agreed with Jacobs that she called him in January 1996, that she asked him to reserve the hearing dates, and that she told him that she was requesting a new purchase order. However, she denied that she authorized Jacobs to begin preparing for trial. She testified that she told him that a review of the files and depositions in the case was reasonable, but that she would contact him prior to trial to discuss what work was needed. Parry's testimony is consistent with her confirmatory letter of January 24, 1996. Furthermore, Ferrera, Jacobs' contact for the first purchase order, testified that the standard practice of the parties was to discuss what work needed to be performed prior to authorizing Jacobs to begin work. Such a practice was appropriate, reasonable, and plausible. Parry's actions appear to be in conformity with the prior practice of the parties. Jacobs did not refute Ferrera's testimony on this issue. His declaration that he was expressly and affirmatively told that he should begin with unspecified preparation despite the current lack of a purchase order, the ongoing settlement negotiations, and the amount of time before the scheduled trial, is not credible in the overall context of this record.

The Board concludes that Parry did not authorize or direct Jacobs to do any trial preparation after January 1996 for two reasons. First, settlement negotiations were ongoing. Jacobs' assertion that Parry told him categorically that the case would not settle is implausible. There is no indication that the settlement negotiations were viewed as hopeless. In fact, settlement negotiations continued until the settlement was reached the end of March. Under such circumstances, authorization for substantial trial preparation consisting largely of reviewing files and transcripts, which was

concentrated in the last two days in January and in February 1996 for an April trial, would ordinarily have been premature. This was especially so in the absence of any affirmative indication of urgency, and in the face of Jacobs' assertion that he was "going to need some time to re-review the deposition testimony and files," but that "[t]he time spent on this should be minimal...." Moreover, Parry's letter of January 24, 1996, six days before Jacobs allegedly began his intensive review of files, advised of the trial dates during the second half of April; that the government was requesting additional funds under the existing purchase order to cover preparation and appearance at trial; and, explicitly, that government counsel would be in contact with Jacobs " well before the trial to discuss what you need to do to prepare for trial." It is settled law that, if Jacobs perceived any ambiguity in the directions, he was obliged to seek clarification, or proceed at his peril. *See, e.g., Maintenance Engineers, Inc. v. United States*, 21 Cl. Ct. 553, 559-60 (1990)

Second, the Board concludes that Jacobs' confirmatory letter of February 5, 1996, spoke prospectively regarding the need for a new purchase order, and that "I am going to need some time to re-review the deposition testimony and files. The time spent on this should be minimal," but inexplicably, made no mention of the 12.95 hours of work Jacobs had allegedly already performed each day but one over the last six days. In addition, that work had apparently been initiated almost immediately after Jacobs' receipt of the January 24, 1996, letter from Parry advising that the second purchase order was prospective, and indicating that work to be done was subject to future direction. These circumstances make Jacobs' insistence, that he had express direction from Parry to proceed immediately with trial preparation, implausible. The contracting officer also points out that the fact that Jacobs did not submit monthly invoices for January and February 1996, within fifteen days of the end of the month in which the work was performed, as required by the purchase orders, permits an inference that Jacobs doubted that the hours of work represented were compensable.

In addition, Ferrera declared that it had been established practice to discuss with Jacobs the particular work that he was to do in advance of authorization. Jacobs does not directly dispute this assertion or the existence of such a previous arrangement under the first purchase order. There is no evidence of an express agreement to change that practice. Because Jacobs admitted that there were no communications between Parry and himself after issuance of the new purchase order until he called to inquire about the status of the case on March 27, 1996, and because there is no evidence to the contrary, Jacobs' assertion that he worked under specific direction of the PWBA attorneys, to the extent that it relates to the hiatus after funds were exhausted under the first purchase order, is not credible. In any event, Parry would not have had authority to direct him to work without an effective purchase order or contract, and he is charged under applicable law with ascertaining the authority of government representatives. *See generally, Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) This sequence of events establishes that Jacobs proceeded with the work at his peril and without authorization until the purchase order was issued almost a month later. There was no contract, and there was no basis for a finding of a contract implied -in-fact, since Parry apparently was not advised that this work had been done or was ongoing, rather than prospective, and not within her direction.

The new purchase order was issued on February 28, 1996, and canceled April 4, 1996, after

notice of the settlement at the end of March. Jacobs claimed to have worked 5.70 hours after February 28, on March 12, 26, 27, and April 11, 1996, the latter for an hour after cancellation of the purchase order needed to prepare a formal report, which is apparently not of record, and billing. There is no dispute that Jacobs had not received any directions from Parry during this period, because he had inquired on March 28, 1996, as to the status of the case, and had been advised that it had just settled. Jacobs states with less than model clarity in his own declaration that there was a gap in communications between himself and Parry after issuance of the purchase order until he called Parry on March 27 to ascertain the status of the case. The Board finds, however, that Parry's letter of January 25, 1996, unambiguously put Jacobs on notice that he was to prepare for trial at the direction of Parry, and not exclusively at his own initiative. To the extent that there was any patent ambiguity in the form of the "AS REQ" entry on the purchase orders, or in Parry's instructions contained in the January 25, 1996 letter, Jacobs was under a duty to inquire and request clarification. *See Maintenance Engineers, Inc. v. United States*, 21 Cl. Ct. 553, 559-60 (1990).

Given the prior course of dealings and Parry's caveat in her January 24, 1996, letter, the issuance of the new purchase order was not, without more, and unrestricted authorization to proceed with the trial preparation work entirely at Jacobs' discretion. The terms of the second purchase order specified that delivery of services was to be "AS REQ", which means either "as requested" or "as required." The "AS REQ" designation is manifestly ambiguous, but obviously implies that the performances of services under the purchase order would require a determination of need by someone. Under the circumstances, it may be inferred that an abdication by the contracting officer to Jacobs was not contemplated. Rather, the course of dealings and the explicit caveat by Parry establishes that Parry, on behalf of the PWBA, would provide additional instructions to Jacobs prior to the performance of services. Parry never contacted Jacobs to discuss the specific work that he would need to perform. Jacobs did not advise Parry that he was performing services or that he had done so. Jacobs, therefore, assumed the risk of performing unauthorized work. The work he did was unneeded, because the case settled. It was done without direction from Parry, who had indicated that it was not to proceed without her direction. Therefore, the portion of the claim which pertains to work invoiced after the new purchase order was issued, also fails. Jacobs has failed to prove that he was authorized to do the work he allegedly did under Purchase Order No. B936-1700, and his appeal must be denied.

ORDER

Appellant's appeal is denied.

_____
Edward Terhune Miller
Member, Board of Contract Appeals

_____
Stuart A. Levin
Member, Board of Contract Appeals

_____
John M. Vittone

Chair, Board of Contract Appeals